U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 24Oct2002

CASE NO.: 2001-LHC-2778
OWCP NO.: 01-152201

In the Matter Of:

JAMES F. SERIO
Claimant

v.

ELECTRIC BOAT CORPORATION/
GENERAL DYNAMICS CORPORATION
Employer/Self-Insurer

and

INA/ACE USA
Carrier

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Peter A. Clarkin, Esq.
For the Employer/Self-Insurer

Michael McCauliffe, Esq.
For the Carrier

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 11, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, EX for a Carrier's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on April 3, 2001 in the course and scope of his employment.

4. Claimant gave the Employer notice of the alleged injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 13, 2001.

7. The applicable average weekly wage is in dispute.

8. The Employer and Carrier have paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether or not Claimant's pulmonary condition is causally related to his maritime employment with the Employer.

2. If so, the nature and extent of his disability.

3. Claimant's average weekly wage.

4. Whether Claimant is a so-called voluntary retiree.

5. The Responsible Employer.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 5	Attorney Embry's letter filing CX 4, a document admitted into evidence at the hearing	03/22/02
CX 6	Attorney Embry's letter filing the	04/12/02

CX 7	March 14, 2002 Deposition Testimony of the Claimant	04/12/02
CX 8	Attorney Embry's status report	06/17/02
CX 9	Attorney Embry's letter filing the	07/03/02
CX 10	June 7, 2002 report of Norman Panting, M.D.	07/03/02
ALJ EX 12	This Court's **ORDER** relating to post-hearing evidence	08/26/02
CX 11	Attorney Embry's response	09/19/02
CX 11A	Claimant's brief	09/19/02
CX 12	Attorney Embry's letter filing his	09/23/02
CX 13	Fee Petition	09/23/02

The record was closed on September 23, 2002 as no further documents were filed.

Summary of the Evidence

James F. Serio ("Claimant" herein), sixty-seven (67) years of age, with a ninth grade formal education and an employment history of manual labor, began working in 1957 as a chipper/grinder at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As part of his assigned duties, Claimant used various hand-held pneumatic tools and he "worked with welders, chipping welds, grinding, tank testing, drilling," etc. He often worked in tight and confined areas all over the boats. Claimant testified that he worked on both new construction and the overhauling of already-commissioned submarines. (CX 7 at 3-7)

Claimant did work in close proximity to the pipe laggers who were using asbestos in various forms to cover and insulate the pipes. When the asbestos powder was mixed to create an asbestos paste Claimant testified that the "air was kind of cloudy, and it was kind of little tough breathing." He was also present when the laggers ripped out old asbestos from the pipes and the equipment "quite often," and this removal of the old asbestos produced so much dust that the ambient air of the work environment was "cloudy" to such an extent that you "couldn't see from one end of the missile room to the other." He also used asbestos blankets as a

carpet so that he could lie down on the floor to work on the hot steel, Claimant remarking that "a lot of times a grinder would hit some of the asbestos and just throw a cloud of asbestos around, and you had to get out of there because it was too much, it was too cloudy." (CX 7 at 8-9)

Claimant, except for a short layoff in 1961, worked as a chipper/grinder until 1967, at which time he left the shipyard and he went to work on the West Coast at the Long Beach Naval Shipyard as a chipper/grinder and as a civilian employee for the U.S. Government. He worked there for about three (3) years, married and moved to San Francisco and he "went back in(to) the produce business." He continued to use various hand held pneumatic tools and he also had some exposure to asbestos while working at that shipyard. After Claimant left the Long Beach shipyard, he had no further exposure to asbestos and since he left the Electric Boat shipyard, he has not worked for any other privately owned shipyard; nor has he done any other longshoring work. In the produce business he "was a produce buyer, manager and a produce clerk" and "set up the produce stands." He did that work for twenty (20) years and in 1986 he returned to the East Coast, reapplied for work at the Employer's shipyard but was not rehired. (CX 7 at 9-14)

Claimant last performed full-time work in 1992, at which time he went out on disability to have hand surgery. He then had five (5) additional hand surgeries. He applied for Social Security benefits in 1997 at age 62. He also receives a pension from the produce union. As Claimant has worked continually until 1992 and in order to keep himself busy, he works one or two days a week, on an "on call" basis for a national rental car company, Claimant remarking that he "deliver(s) cars" from "one location to another." He earns "maybe about 90 dollars, hundred dollars" every two weeks. He also works as needed at a golf course and "barbecues" for the members during tournaments, usually during the summer months. Claimant's 2000 1040 U.S. Tax Form reflects total wages of $5,128.00, a small amount of interest income and a taxable IRA distribution of $5,244.00. (CX 4, CX 7 at 14-17)

Claimant began to experience shortness of breath at the end of 2000 or the beginning of 2001 and he went to see Dr. Reddy, his family doctor, who referred Claimant for x-rays and other tests. He was told that he had asbestosis and he was referred to Dr. Ikeda, a pulmonary specialist. He has also been seen by other doctors and these reports will be summarized below. Claimant has worn bilateral hearing aids for the last several years. No one ever told Claimant that the grinding wheels with which he worked were bound together with asbestos. He also used pneumatic air hoses to clean out and blow down the asbestos dust from confined areas, Claimant remarking that this cleaning produced "a lot of dust" and his work "clothes were kind of dirty" and "grimy." (CX 7 at 17-24)

Claimant's medical problems are summarized in the March 20, 2001 report of Daniel P. Ikeda, a pulmonary specialist, wherein the doctor states as follows (CX 1):

INITIAL CONSULTATION

PHYSICIAN REQUESTING CONSULTATION: Bhaskara Reddy, M.D.
CHIEF COMPLAINT: Shortness of breath.

PROBLEM LIST:

1. Progressive pulmonary fibrosis.
2. Evidence of prior asbestos exposure.
3. History of vocal cord leukoplakia, possibly also related to prior asbestos exposure.
4. Hypoxemia with ambulation.

HISTORY OF PRESENT ILLNESS:

James Serio is a 66-year-old retired pipefitter who presents here with a three-month history of progressive shortness of breath with exertion. Over the past three to four months, the patient has noted that when he tried to walk, he would begin to huff and puff with a nonproductive cough. As a result, the patient was evaluated by Dr. Bhaskara Reddy in January at which time he had a chest x-ray which showed cardiomegaly and bilateral interstitial infiltrates possibly consistent with pneumonia. A repeat x-ray one month later in February with no change in symptoms continued to show the same process. As a result, the patient underwent CT scan of the lung in March at which time the CT scan was remarkable for evidence of asbestos exposure with the presence of calcified pleural plaques. There is diffuse interstitial abnormality indicative of end-stage lung disease with honeycombing consistent with pulmonary fibrosis and probability of a positive relationship to past asbestos exposure. A possible nodule was also present in the right upper lobe vs. a pleural area of thickening. Because of this the patient is now sent here.

The patient states that he has a history of smoking between the ages of 16 and 42 up to two packs per day, but has not smoked a cigarette now in the past 17 years.

In determining his past exposure to asbestos, the patient states that he worked as a pipefitter initially for General Dynamics beginning around 1957 to 1967, as a tank tester in the development and building of submarines. Between 1968 and 1970, the patient worked for the U.S. Government at the Long Beach facility, again as a pipefitter. In both occupations, he was heavily exposed to asbestos particles.

In 1985, the patient was evaluated at UC Davis for evidence of recurrent leukoplakia involving the right vocal cords. He

underwent laser removal of the area of leukoplakia where pathologic description of this lesion revealed hyperplasia of squamous epithelium with hyperkeratosis.

Subsequent to this, the patient has had no real symptoms related to pulmonary disease until over the past three to four months. The patient has had prior x-rays but unfortunately, they are not available for comparison. He denies any fever, history of tuberculosis, history of pneumonia. He denies any history of wheezing.

PAST MEDICAL HISTORY:

ALLERGIES: None known...

IMPRESSION:

Pulmonary fibrosis as cause of shortness of breath with evidence of prior asbestos exposure as the underlying etiology of fibrosis. The patient has evidence of ambulatory hypoxemia as well as an explanation for his exertional dyspnea.

PLAN:

At this time, I will obtain full pulmonary function tests and gallium lung scan for baseline status of the patient's pulmonary fibrosis. Whether or not we will initiate therapy to treat pulmonary fibrosis will in part be dependent upon the findings of these studies.

In the meantime, the patient has already initiated discussions with lawyers regarding the class action suits that are currently pending for individuals involved with asbestos exposure. I will reevaluate him in one to two weeks following gallium lung scan as well as full pulmonary function tests, according to the doctor.

Dr. Douglas M. Sides, a radiologist, read Claimant's February 6, 2001 chest x-ray as showing (CX 2):

EVIDENCE OF ASBESTOSIS EXPOSURE. CALCIFIED PLEURAL PLAQUE IS NOTED BILATERALLY.

DIFFUSE INTERSTITIAL ABNORMALITY WITH AREAS OF END-STAGE LUNG AND HONEYCOMBING. GIVEN THE PRESENCE OF ASBESTOSIS EXPOSURE, THIS WOULD LIKELY REPRESENT ASBESTOSIS.

POSSIBLE SMALL NODULE VERSUS NODULAR PLEURAL THICKENING EITHER WITHIN THE RIGHT UPPER LOBE OR ALONG THE MAJOR FISSURE SEEN ON IMAGE NUMBER 19. FOLLOWUP EXAMINATION IS RECOMMENDED TO DOCUMENT THAT THIS REMAINS STABLE.

SMALL ADRENAL ADENOMA ON THE RIGHT.

CORONARY ARTERY DISEASE WITH CALCIFICATION INVOLVING THE LEFT ANTERIOR DESCENDING ARTERY, according to the doctor.

Dr. Arthur C. De Graff, Jr., a pulmonary specialist, reviewed Claimant's medical records and the doctor reported as follows in his December 4, 2001 letter to Claimant's counsel (CX 3):

Thank you for asking me to review Mr. Serio's medical records. I note that Mr. Serio was seen by Dr. Daniel Ikeda in pulmonary consultation on 3/20/01. At that time he had a two-month history of shortness of breath with exertion. Chest x-ray revealed bilateral interstitial infiltrates and cardiomegaly. Follow-up chest x-ray in one month showed no change in pulmonary findings. CT scan was performed which apparently revealed the presence of calcified pleural plaques and interstitial abnormalities consistent with end stage pulmonary fibrosis with honeycombing. Possible nodules were also noted in the upper lobe. The x-ray changes are consistent with diagnosis of asbestosis and asbestos-related pleural disease.

Mr. Serio worked at Electric Boat as a chipper from 1957 through 1966, and from 1968 to 1970 he worked for the U.S. government at the Long Beach facility in California as a pipefitter. At Electric Boat he would have had heavy exposure to asbestos and continued asbestos exposure at the Long Beach facility. He apparently smoked from age 16 through age 42. He is now age 66.

PAST MEDICAL HISTORY: Significant only for evidence of leukoplakia involving the right vocal cord in 1985. This was apparently treated by laser. Past medical history is otherwise unremarkable.

PHYSICAL EXAMINATION: Significant for the presence of "dry rales" at both lung bases.

LABORATORY STUDIES: Oxygen study was performed and demonstrated arterial oxygen desaturation of 84% while walking to 1100 feet.

LUNG FUNCTION STUDIES: Using the **AMA Guide to Evaluation of Permanent Impairment** prediction formulas, Mr. Serio's forced vital capacity is 63% of its predicted value and one-second expiratory volume 71% of its predicted value. Total lung capacity is 64% of its stated predicted value. The values are consistent with diagnosis of restrictive lung disease without airway obstruction. Apparent diffusing capacity, again using standards from the **AMA Guide to Evaluation of Permanent Impairment**, was 33% of its predicted value.

Assuming disability resulting from diffusing capacity reduced to 40% of its predicted value causing 50% impairment of the whole person and diffusing capacity reduced to 25% of its predicted value

causing 100% impairment of the whole person, Mr. Serio is 73% impaired as of the whole person. Since there is no evidence of airway obstruction, there is no evidence that Mr. Serio's past cigarette smoke exposure caused significant lung damage and therefore his disability is entirely due to past asbestos exposure, according to the doctor.

The Carrier has had Claimant examined by its medical expert, Dr. Normal Panting, and the doctor reports as following in his June 7, 2002 letter to the Carrier (CX 10):

Thank you very much for your letter of 5/7/02 asking me to examine the above-named claimant on your behalf. Mr. Serio is a 67-year-old, right-handed, widowed, male shipyard worker employed by General Dynamics from 1957 through 1967 and by the Long Beach Naval Shipyard from 1968 through 1970. He was examined in my Sacramento office on 5/2/02 at 9 a.m.

Per your correspondence of 5/7/02, it is my understanding that this evaluation has been requested as a medical consultation. This report is submitted per the Official Medical Fee Schedule (OMFS) as an initial consultation. Additionally, non-face-to-face time with the patient was 4 hours and 30 minutes, which is billed using the IMFS code 99358. Lastly, my report is 9 pages. this is submitted as a 99080 report code.

HISTORY OF INJURY AND ILLNESS AS STATED BY THE CLAIMANT:

Mr. Serio stated that he felt well until 10/00, when he noted shortness of breath upon walking and fairly minor daily activities. He went to see Dr. B. Redoi at Sutter Hospital, Sacramento, who took a chest x-ray and he was advised that he had an enlarged heart on 1/23/01. He then had a CT of the chest examination on 3/5/01 that revealed that he had pulmonary asbestosis. He was then referred to Dr. Daniel Ikeda, pulmonologist, who examined him on 3/20/01 and also advised him that he had asbestosis. He also had pulmonary function tests, the exact results of which he is not aware except that they were abnormal. He was treated with prednisone, 60 mg a day for four weeks, with minimal improvement of his exertional shortness of breath. As a side effect, his blood sugar went up to 550 and therefore he was placed on oral mediation for diabetes. He was also tried on bronchodilators including Advair Diskus, a preparation that continues fluticasone and salmeterol, for three weeks with minimal improvement consisting of less wheezing.

PRESENT STATUS:

He states he becomes short of breath walking half a block at a flat level, relieved by stopping. He also develops shortness of breath after climbing 12 to 14 steps, which makes him huff and puff. As far as daily activities, he is able to drive his own car on the

freeway and drove two hours one-way for the purpose of this examination without developing any shortness of breath. He is a widower and is able to cook some of his meals, goes shopping every two days, and is able to carry two grocery bags but becomes slightly short of breath after climbing four steps and walking 50 feet from his carport to the entrance of his house. He is able to clean his own house, vacuums, does dishes, and does his own laundry... He has had slight swelling in his feet but denies any chest pain or palpitations. He does have a chronic cough which is mild to moderate, worse outdoors. He denies any wheezing, asthma, or hay fever. He adds that he smoked two packs a day from 1951 through 1985 and quit because he developed a benign tumor and plaque in his vocal cords, corrected by surgery by Dr. Dedo. Current medications include Advair Discus 100/50 twice a day; Pravachol, 20 mg daily, for high cholesterol levels for the last two years; Ecotrin (aspirin), 81 mg daily for the last two years; Azopt eye drops three times a day; and Xalatan eye drops, one daily. He adds that he has been working one or two days a week for Avis Rent-A-Car, driving their rental cars to and from various locations in northern California.

WORK HISTORY:

He completed high school in 1951. Between 1955 and 1957, he served in the U.S. Army and served as a staff car driver. Between 1957 through 1967, he worked for Electric Boat as a chipper-pipe grinder, driller, and tank tester in Connecticut. He states that there was a lot of dust all over the shipyard, including asbestos, and he did not wear a mask. From 1968 to 1970, he worked for the Long Beach Naval Shipyard chipper, grinder, and repairman and was again exposed to dust and asbestos, but he states he wore a mask sometimes, and the atmosphere was not as dusty as it was working for General Dynamics because he worked within an aircraft carrier and there was no air flow. In 1970, he went to work for Mayfair Supermarket as a produce man and took an early retirement in 1986.

JOB DESCRIPTION:

Job Title: Chipper - pipe grinder.

Job Duties: See work history. . .

REVIEW OF RECORDS:

The following records are reviewed:

1. Chest x-ray dated 7/12/57, negative.

2. Employer’s First Report of Occupational Injury or Illness dated 2/27/87 by General Dynamics/Electric Boat Division, with the employee alleging exposure to lung irritants in 1961.

3. Operative report by H. Dedo, M.D., 10/28/85. Diagnosis: Recurrent leukoplakia. Operation: Laser excision of leukoplakia.

4. Pathology report dated 10/28/85, Dr. Ljung. Diagnosis: Squamous epithelium without atypia.

5. Hearing test, 7/27/86, revealed normal hearing for speech frequency and moderate high-frequency loss.

6. Chest x-ray, 7/25/86, read as negative.

7. Pulmonary medicine consultation by Daniel Ikeda, M.D., dated 3/20/01. The patient was seen at the request of B. Reddy, M.D., because of shortness of breath. Dr. Ikeda noted a three-month history of progressive shortness of breath with exertion. Chest x-ray of 1/01 had revealed cardiomegaly as well as bilateral interstitial infiltrates, possibly consistent with pneumonia. Repeat chest x-ray in 2/01 showed no changes. CT scan of the lungs in 3/01 revealed evidence of asbestos exposure with the presence of calcified pleural plaques as well as interstitial diffuse abnormality indicative of end-stage lung disease with honeycombing consistent with pulmonary fibrosis and probability of a positive relationship to past asbestos exposure. Dr. Ikeda also noted that the patient had a history of smoking between the ages of 16 and 42 up to two packs a day, none in the preceding 17 years. Heavy exposure to asbestos particles was noted between 1957 and 1967, and again between 1968 and 1970. Ambulatory oximetry study revealed significant oxygen desaturation down to a low of 84 percent with activity, with the patient improving quickly into the 90s following rest. Dr. Ikeda opined that the patient had pulmonary fibrosis as a cause of shortness of breath with evidence of prior asbestos exposure as the underlying cause of the fibrosis. He noted evidence of ambulatory hypoxemia as an explanation of his shortness of breath on exertion.

8. Chest x-ray dated 2/6/01 reveals a density in the right mid lung field and hilar, mild cardiomegaly without pulmonary venous congestion or pleural effusion, emphysematous configuration of the lungs. No changes from 1/23/01 were noted.

9. CT thorax without contrast dated 3/5/01 revealed mild cardiomegaly as well as coronary artery disease with calcification involving the LAD and no pericardial effusions. Mediastinal lymph node adenopathy was noted, but there was no evidence of hilar or axillary adenopathy. Calcified pleural plaques were noted bilaterally, as well as diffuse interstitial abnormality associated with honeycombing in both upper lung fields as well as both lower lobes. A tiny nodule

versus pleural thickening along the major fissure on the right was seen in one image. A 1 cm right adrenal nodule was consistent with adenoma. Impression was: 1) Evidence of asbestosis exposure. Calcified pleural plaque noted bilaterally. 2) Diffuse interstitial abnormality with areas of end-stage lung and honeycombing likely representing asbestosis. 3) Possible small nodule versus nodular pleural thickening either within the right upper lobe or along the major fissure. Followup examination is recommended. 4) Small adrenal adenoma on the right. 5) Coronary artery disease with calcification involving the LAD.

10. Oximetry study dated 3/20/01 reveals a resting saturation of 94 percent, decreasing to 90 percent within one minute and as low as 84 percent in two minutes with exercise. it went back up to 95 after resting for four minutes.

11. Gadolinium study dated 4/6/01 revealed diffuse grade III/IV activity seen throughout both lungs consistent with metabolic reactive pulmonary fibrosis. A small subtle focal abnormality was noted on the left chest representing a left sixth intercostal joint indicating recent fracture or infection, interpreted by T.R. Pounds, M.D.

12. Pulmonary function studies done on 4/3/01 revealed a forced vital capacity of 2.65 liters, or 64 percent of predicted. FEV1 percent was 2.35 liters per second, or 83 percent of predicted. Lung volumes were 64 percent of predicted. Diffusion values were 40 percent of predicted. Oxygen saturation was 86 percent.

13. Consultation by Arthur DeGraff, Jr., M.D., dated 12/4/01 was reviewed. He opined that using the **AMA Guides to Evaluation of Permanent Impairment** prediction formulas, Mr. Serio's pulmonary function tests were consistent with a diagnosis of restrictive lung disease without airway obstruction. He also noted an apparent diffusing capacity of 33 percent of predicted value, and he opined that Mr. Serio was 73 percent impaired as of the whole person. He also noted that there was no evidence of airway obstruction, therefore, there was no evidence that Mr. Serio's past cigarette exposure had caused significant lung damage, and therefore, his disability was entirely due to past asbestos exposure. He does not mention that Mr. Serio had cardiomegaly as well as heavily calcified left anterior descending coronary artery in the CT scan of the chest.

PHYSICAL EXAMINATION:

GENERAL: Mr. Serio is a short, stocky, obese, white male who appeared his stated age and who became short of breath while undressing and dressing for the purpose of this examination. He

was most pleasant and cooperative. He ambulated slowly down the hall without using an assistive device.

VITAL SIGNS: Height 5'6". Weight 238 pounds (ideal weight 150 pounds). Blood pressure 150/80, both arms, using a large cuff. Pulse 69 BPM and regular. Respiratory rate 18...

DIAGNOSTIC STUDIES:

None were ordered.

DIAGNOSES:

1. Chronic interstitial lung disease with pulmonary fibrosis (asbestosis and exertional desaturation).

2. Atherosclerotic coronary artery disease with calcified left anterior descending coronary artery and mild cardiomegaly.

3. Obesity.

OPINION:

I am in agreement with Dr. Ikeda that Mr. Serio has chronic diffuse lung scarring (asbestosis) secondary to asbestos fiber exposure while working as a chipper in a submarine and aircraft carrier for prolonged periods of time many years ago. Past exposure is specifically indicated by the presence of pleural plaques which are characterized by calcifications along the parietal pleura. He also has classical honeycombed appearance in his chest radiographs but no evidence of mesotheliomas that are occasionally associated with asbestos exposure. His condition is industrial in causation.

His factors of disability are as follows:

SUBJECTIVE FACTORS:

Shortness of breath walking 1-1/2 blocks or climbing one flight of stairs.

OBJECTIVE FACTORS:

1. Coarse rales on physical examination.

2. Pulmonary function testing dated 4/3/01 indicating FVC 64 percent, FEV1 83 percent, FVC/FEV1 89 percent, total lung capacity 64 percent, diffusion capacity 38 percent of predicted, oxygen saturation 96 percent at rest dropping to 84 percent with activity.

3. Abnormal chest x-ray dated 2/6/01.

4. Abnormal CT of thorax dated 4/5/01.

5. Abnormal gadolinium nuclear study, 4/6/01.

WORK RESTRICTIONS:

He meets Class IV of the **Guidelines for Evaluation of Pulmonary Disability of the California Industrial Medical Council** based on the above testing. Use of inhaled anti-inflammatory agents raises him by one class to Class V, precluding him to Sedentary Work only. Using the **AMA Guidelines for the Respiratory System**, he meets Class III, Moderate, with impairment of the whole person between 26 and 50 percent.

FUTURE MEDICAL TREATMENT:

He will need to visit his pulmonologist every six months or so on an industrial basis. He needs to continue taking his Diskus twice a day on an industrial basis. He needs to be monitored for possible mesothelioma in the future. Use of Pravachol for hypercholesterolemia, Ecotrin as well as eye drops for glaucoma should be on a non-industrial basis.

APPORTIONMENT:

His permanent disability should be apportioned 83.33 percent to General Dynamics and 16.66 percent to the federal government (employment at Long Beach labor yard) based on years of employment, according to the doctor.

On the basis of the totality of this record, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its

provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant

establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial" evidence sufficient to negate the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer

must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer and Carrier dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to them to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his

condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestosis, resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the

sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record leads ineluctably to the conclusion, and I so find and conclude, that Claimant’s exposure to asbestos, welding and grinding dust and other injurious pulmonary stimuli has resulted in his asbestosis, that the date of injury is April 3, 2001, that the Employer had timely notice of such injury, that the Employer and Carrier timely controverted Claimant’s entitlement to benefits and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d

644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Asbestosis in my judgment, is such a condition.

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

The Longshore Act requires the use of the **American Medical Association Guides to the Evaluation of Permanent Impairment** for retiree claims and it provides that an individual is Class IV 50-100% impaired if his diffusing capacity is below 40%. Table 5-12 at page 107.

Dr. Panting noted that the Claimant’s diffusing capacity was 38% of predicted. Therefore he clearly falls within the Class IV rating and Dr. DeGraff’s rating should be given greater weight and he should be found to have a seventy-three (73%) whole man impairment, and I so find and conclude.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

33 U.S.C. 910(d)(2) provides that for any claim based on death or disability due to occupational death for which the time of injury occurs within one year from the date the employee retires, the average weekly wage shall be deemed to be the national average weekly wage at the time of the injury.

Mr. Serio retired in 1997 and his pulmonary condition was diagnosed in 2001. Therefore it appears to fall within the provisions of section 910(d)(2). However he also testified that he continues to work on a sporadic basis in order to supplement his retirement benefits. The employer therefore raises the question as to whether an individual who continues to work on a part-time basis supplementing his retirement benefits is a retiree under section 10(d)(2)(d).

This matter was considered by the Benefits Review Board in the case of **George Jones v. United States Steel Corporation**, 22 BRBS 229 (May 26, 1989). The Benefits Review Board vacated the Administrative Law Judge’s decision in **Jones** holding that an individual in Mr. Serio’s work status was not a retiree since they continued to work on a part-time basis.

The Benefits Review Board vacated the decision and awarded benefits based upon the national average weekly wage holding that an individual who works part-time to supplement his retirement is still a retiree.

The Board noted that pursuant to 20 CFR section 702.601(c) “retirement shall mean that the claimant or decedent in cases involving survivor’s benefits, have voluntary withdrawn from the workforce and there is no realistic expectation that such persons shall return to the workforce.”

The Board noted that this definition of retirement replaced one set forth in the interim regulation which defined retirement as “not being employed with no realistic expectation of returning to the workforce.” Federal regulations 384, 406 (January 3, 1985) the Board noted that the change in the language in the regulations

from having “no earnings” to withdrawing from the workplace” suggests a realistic view that a worker can have some earnings without being part of the workforce and that part-time work to supplement retirement earnings did not necessarily defeat the contention that the worker is retired within meaning of the Act and its regulation.

Accordingly, in view of the foregoing, Claimant is a voluntary retiree as he stopped working full-time in 1992 because of his hand problems and because his shortness of breath did not begin until the end of 2000 or the beginning of 2001. That Claimant works part-time, one or two days per week, does not prevent his status as a voluntary retiree and I so find and conclude. In this regard, **see Jones v. U.S. Steel Corporation**, 22 BRBS 229 (1986).

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA **Guides**. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent’s l8ungs under the AMA **Guides** was an April 1986 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons’ Company**, 24 BRBS 46, 51 (1990).

As Claimant’s permanent partial impairment can reasonably be rated at seventy-three (73%) percent, Claimant is entitled to an award of benefits for such impairment based upon the National Average Weekly Wage of $466.91 or $227.23 per week, commencing on April 3, 2001, the date of injury.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in

our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be

entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, the Carrier shall immediately authorize and pay for the reasonable and necessary medical care and treatment related to his asbestosis, commencing on March 20, 2001. Such expenses shall be subject to the provisions of Section 7 of the Act. Claimant is also entitled to a complete annual physical examination, including pulmonary and diagnostic testing, to monitor his asbestosis.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant's entitlement to benefits. **Universal Dredging Corporation**, 15 BRBS 502, 506 (1979).

Responsible Employer

The Carrier joined herein is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Claimant was last exposed to asbestos and other injurious pulmonary stimuli as a maritime employee in 1967, at which time the Carrier was on the risk under the Longshore Act. Accordingly, the Carrier is responsible for all of the benefits awarded herein. While Claimant later may have been exposed to asbestos as a federal employee at the Long Beach Naval Shipyard, this Court has no jurisdiction over that facility.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Carrier joined herein. Claimant's attorney filed a fee application on September 23, 2002 (CX 13), concerning services rendered and costs incurred in representing Claimant between July 13, 2001 and September 10, 2002. Attorney Stephen C. Embry seeks a fee of $7,125.75 (including expenses) based on 26.70 hours of attorney time at $150.00 and $165.00 per hour and 4 hours of paralegal time at various hourly rates.

In accordance with established practice, I will consider only those services rendered and costs incurred after June 13, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $7,125.75 (including expenses of $885.50) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. ACE/USA (Carrier) shall pay to Claimant compensation for his seventy-three (73%) percent permanent partial impairment from April 3, 2001 through the present and continuing, based upon the National Average Weekly Wage of $466.91, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act. Claimant submits the weekly amount is $227.23.

2. Interest shall be paid by the Carrier on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. The Carrier shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on March 20, 2001, including a complete annual physical examination, subject to the provisions of Section 7 of the Act.

4. The Carrier shall pay to Claimant's attorney, Stephen C. Embry, the sum of $7,125.75 (including expenses) as a reasonable fee for representing Claimant herein after June 13, 2001 before the Office of Administrative Law Judges and between July 13, 2001 and September 10, 2002.

5. The Electric Boat Corporation as a self-insurer shall be **DISMISSED** as a party herein.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl